## National Labor Relations Board



# Weekly Summary of NLRB Cases

**Division of Information** 

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Tel. (202) 273-1991

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American Medical Response, Inc. (32-RC-5234, 32-RD-1450; 344 NLRB No. 161) Livermore, CA Aug. 17, 2005. The administrative law judge overruled SEIU United Healthcare Workers West's Objection 3 alleging that the failure to provide the Employer's critical care transport registered nurses (RNs), who are professional employees under the Act, with a Sonotone ballot warranted setting aside the mail ballot election held from February 23 through March 16, 2005. Sonotone Corp., 90 NLRB 1236 (1950). Contrary to the judge, the Board found that the election failed to comport with the requirements of Section 9(b)(1) of the Act. It sustained Objection 3, set aside the election, and directed a third election. The tally of ballots showed 848 for National Emergency Medical Services Assn. (NEMSA), 580 for SEIU, 19 against the participating labor organizations, and 90 challenged ballots, an insufficient number to affect the results of the election. [HTML] [PDF]

The judge concluded that a *Sonotone* ballot was not necessary based on the assumption that professional employees need only have one opportunity to vote on inclusion in a mixed professional/nonprofessional unit. However, that assumption is inconsistent with the Board's decision in *Westinghouse Electric Corp.*, 116 NLRB 1545, 1547 (1956).

Here, the election was held in a unit that, contrary to Section 9(b), combined professional employees with nonprofessional employees without affording the professionals an opportunity to vote whether they wished to be included in such a unit. The Board therefore directed elections in the following separate voting groups, one consisting of all RNs and the other consisting of all other nonprofessional unit employees. As set forth in *Sonotone*, the RNs will be asked the following two questions on their ballots:

- (1) Do you wish to be included with nonprofessional employees in a unit for the purposes of collective bargaining?
- (2) Do you wish to be represented for purposes of collective bargaining by National Emergency Medical Services Association; by SEIU United Healthcare Workers West, Service Employees International Union; or by neither?

If a majority of the professional employees vote "yes" to the first question, their vote on the second question will be counted with the votes of the nonprofessional employees to decide which union, if any, shall be the representative for the entire combined bargaining unit. If the RNs do not vote for inclusion, their votes on the second question will be separately counted to decide whether they want either of the Unions on the ballot to represent them in a separate professional unit. Similarly, the votes of the nonprofessionals would be separately counted to decide whether they want either of the Unions on the ballot to represent them in a separate nonprofessional unit.

In light of the Board's disposition of SEIU's Objection 3, it found it unnecessary to rule on SEIU's request for review of the Regional Director's overruling of its Objections 1 and 2.

(Chairman Battista and Members Liebman and Schaumber participated.)

B & B Trucking, Inc. (7-CA-47022; 345 NLRB No. 2) Kalamazoo, MI Aug. 19, 2005. In affirming the administrative law judge, the Board held that the Respondent violated Section 8(a)(1) of the Act by disparaging B & B Trucking Inc. Employees Association, advising employees to change their representatives, and seeking to interfere in the Union's internal affairs. It also agreed that the Respondent violated Section 8(a)(5) and (1) by dealing directly with employees and bypassing the Union, delaying provision of and failing to provide relevant and necessary information requested by the Union concerning bargaining unit employees' health benefit costs, and refusing to bargain with the Union by unilaterally changing the open enrollment period for employee health benefits and unilaterally implementing its proposal to offset a 20-cent-increase in hourly fringe benefits with a corresponding decrease in wages.

[HTML] [PDF]

The Board modified paragraph 2(a) of the judge's recommended Order to require the Respondent to rescind the unilaterally implemented proposal. Additionally, the Board modified the judge's Order (1) to reflect the appropriate method of calculating backpay, (2) to include an inadvertently omitted remedy for the Respondent's unlawful unilateral change to the open enrollment period for health benefits, and (3) to more closely conform to the Board's standard remedial language.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by B & B Trucking Inc. Employees Association; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Kalamazoo, June 23-24, 2004. Adm. Law Judge Jane Vandeventer issued her decision May 27, 2005.

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Centex Independent Electrical Contractors Association, Inc. and Mills Electric, Inc. (16-CA-19900; 344 NLRB No. 160) Austin, TX Aug. 15, 2005. The Board adopted the administrative law judge's recommendation and dismissed all allegations in the complaint against Respondent Centex and Respondent Mills. [HTML] [PDF]

The judge found that the General Counsel failed to meet his burden of proving that Centex satisfied the Board's discretionary standards for exercise of jurisdiction as alleged in the complaint. The judge noted that in its answer to the complaint, Centex denied the General Counsel's allegation that it met the Board's jurisdictional standards. However, on the first day of the hearing, Centex amended its answer and stipulated that Centex met the jurisdictional standards as alleged in the complaint. While the judge inadvertently overlooked this stipulation in his decision, the Board found that it has jurisdiction over Respondent Centex and reversed the judge's finding to the contrary. Member Schaumber noted that neither the General Counsel nor the Union raised the jurisdictional issue or Centex's stipulation regarding jurisdiction during closing arguments.

In adopting the judge's dismissal of allegations that Mills' hiring policies violated Section 8(a)(3) and (1) of the Act, the Board noted that, in the absence of exceptions to the judge's recommendations, it did not pass on the judge's discussion of "inherently destructive" and "disparate impact" theories.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Electrical Workers IBEW Local 520; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Austin on Nov. 13-16 and 20, 2001. Adm. Law Judge Keltner W. Locke issued his decision Dec. 19, 2001.

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Electrical Workers IBEW Local 45 (31-CB-11695; 345 NLRB No. 3) Los Angeles, CA Aug. 19, 2005. The administrative law judge concluded, and the Board agreed, that Union Steward Ken Hudgins was acting as an agent of the Respondent when he threatened employee Debra Batosch on October 14, 2004, with fines and termination because she had filed a decertification petition with the Board; and that Hudgins' threats violated Section 8(b)(1)(A) of the Act. In adopting the judge's finding, the Board found it unnecessary to pass on whether Hudgins possessed actual authority to act on the Union's behalf because the judge's findings firmly established Hudgins' apparent authority to do so. [HTML] [PDF]

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Adelphia Communications Corp.; complaint alleged violation of Section 8(b)(1)(A). Hearing at Los Angeles on March 14, 2005. Adm. Law Judge William G. Kocol issued his decision May 17, 2005.

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Fiesta Hotel Corp. d/b/a Palms Hotel and Casino (28-CA-17853; 344 NLRB No. 159) Las Vegas, NV Aug. 15, 2005. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by interrogating employee Martin Perez, impliedly threatening him with discharge, telling employees that they were prohibited from discussing their working conditions, and promulgating and maintaining in effect, in its team member guide, a standards of conduct rule prohibiting employees from loitering on company premises before or after working hours. Chairman Battista would find that the Respondent's rule regarding loitering is lawful. [HTML] [PDF]

The Board reversed the judge's findings that the Respondent violated Section 8(a)(3) by issuing a warning notice to Perez and by discharging him. It found, contrary to the judge, that the Respondent established that it would have issued the warning notice to Perez and discharged

him even in the absence of his union activity. The Respondent issued the warning notice to Perez after he engaged in misconduct unrelated to union activity and subsequently discharged him along with 30 to 40 other employees as part of a general staff reduction.

Chairman Battista and Member Schaumber also reversed the judge's finding that the Respondent violated Section 8(a)(1) by promulgating and maintaining a rule (Standards of conduct rule 10) prohibiting employees from engaging in "conduct which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with. fellow Team Members or patrons." Applying the analysis set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB No. 75 (2004), they maintained that the Respondent's rule 10 does not explicitly restrict activities protected by Section 7. Additionally, Chairman Battista and Member Schaumber wrote that "the Respondent did not promulgate rule 10 in response to union activity nor has it applied rule 10 to restrict the exercise of Section 7 rights. Indeed, there is no complaint allegation that the Respondent unlawfully enforced rule 10."

Member Liebman would find that the standard of conduct rule 10 violates Section 8(a)(1), concluding that an employee would reasonably construe the rule's language as including protected activity, and would thus be chilled in his exercise of Section 7 rights. She wrote:

Today's decision threatens to allow employers to take advantage of the chilling effects of ambiguous rules. To the extent that protected activity is discouraged this way, the employer need never issue an explicit prohibition against it or engage in retaliation after the fact. The result, of course, is every bit contrary to the Act's goals. Accordingly, I dissent.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Local Joint Executive Board of Las Vegas, Culinary Workers Local 226 and Bartenders Local 165, a/w HERE; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Las Vegas, Oct. 22-24, 2002 and Feb. 4 and March 17, 2003. Adm. Law Judge Burton Litvack issued his decision Sept. 30, 2003.

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#### LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

*Milford Manor Nursing & Rehabilitation Center* (SEIU 1199 New Jersey Health Care) W. Milford, NJ August 18, 2005. 22-CA-26745; JD(NY)-38-05, Judge D. Barry Morris.

*Accuride-Cuyahoga Falls* (an Individual and Auto Workers Region 2-B) Cuyahoga Falls, OH August 18, 2005. 6-CA-34308, 34418; JD-67-05, Judge Ira Sandron.

*Iron Workers Local 340* (an Individual) West Olive, MI August 19, 2005. 7-CB-14096; JD-66-05, Judge John T. Clark.

*Midwest Psychological Center, Inc.* (Individuals) Indianapolis, IN August 19, 2005. 25-CA-29381, 29405; JD(ATL)-38-05, Judge John H. West.

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## LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following cases, the Board adopted Reports of Regional Directors or Hearing Officers in the absence of exceptions)

#### DECISION AND CERTIFICATION OF REPRESENTATIVE

Office Max, Inc., Las Vegas, NV, 28-RC-6366, August 15, 2005 (Chairman Battista and Members Liebman and Schaumber)

#### DECISION, ORDER AND DIRECTION OF THIRD ELECTION

Sutter Aluminum Corp., Hammond, IN, 13-RC-21300, August 17 2005 (Chairman Battista and Members Liebman and Schaumber)

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(In the following cases, the Board granted requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

*United Water New York*, W. Nyack, NY, 2-RC-22963, August 15, 2005 (Chairman Battista and Member Schaumber; Member Liebman dissenting)

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(In the following cases, the Board denied requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

- Commodore Construction Corp., Inc., New York, NY, 29-RC-10382, August 16, 2005 (Chairman Battista and Members Liebman and Schaumber)
- James Chevrolet, Inc., West Chester, PA, August 16, 2005 (Chairman Battista and Members Liebman and Schaumber)
- Conagra Foods Packaged Foods Co., Inc., Twin Falls, ID, 27-RC-8389, August 16, 2005 (Chairman Battista and Members Liebman and Schaumber)